81-5338

A. --

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

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SUPREME COURT, U.S.

ROANLD J. STRAIGHT

Petitioner,

-v-

STATE OF FLORIDA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF FLORIDA

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Petitioner, Ronald J. Straight, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Florida in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida is reported in Straight v. State, 397 So. 2d 903 (1981), rehearing denied June 2, 1981, and is attached herto as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on March 19, 1981. A timely Petition for Rehearing was denied on June 2, 1981. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1275(3). This Court granted Petitioner an extension of time to August 31, 1981, within which to file a Petition for a Writ of Certiorari.

QUESTIONS PRESENTED

1. Whether the Supreme Court of Florida construed or applied Sec. 921.141, Fla. Stat. (1975) in an impermissibly vague or overbroad fashion in violation of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

2. Whether a state is obligated by the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to provide Petitioner a fair trial before an impartial jury.

STATUTES INVOLVED

Sec. 921. 141, Fla. Stat. (1975)
(See Appendix "B", attached)

STATEMENT OF THE CASE

Defendant was convicted in the Circuit Court, Duval County, Virginia Q. Beverly, J., of murder and sented to death, and he appealed. The Supreme Court held that: (1) trial court did not abuse its discretion in denying defendant's motion for change of venue; (2) trial court did not err in admitting photographs depicting victim's body which was recovered from river after 20 days, and which showed wounds inflicted on deceased and were quite gruesome because of decomposition; (3) evidence of defendant's flight from police and use of his gun was relevant to issue of his guilty knowledge and thereby to the issue of guilt; (4) assistant state attorney's question suggesting unrelated criminal activity, which was calculated to elicit irrelevant testimonty and suggested to the jury existence of such prejudicial evidence was improper; however, improper comment by itself was insufficient to require that the court grant motion for mistrial; and (5) sentence of death imposed upon defendant was proper.

The Petitioner is an indigent person and is unable financially to pay the costs for this proceeding. Counsel serves without fee as an adjunct attorney with the N.A.A.C.P. Legal Defense Fund.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE COURT'S TREATMENT OF STATUTORY AGGRAVATING CIRCUMSTANCES IS UNCONSTITUTIONALLY OVERBROAD AND IMPERMISSABLY DISTORTS THE WEIGHING PROCESS REQUIRED TO PREVENT ARBITRARY INFLICTION OF THE DEATH PENALTY

The Florida death penalty statute identifies as an aggravating circumstance that a murder was "especially henious, atrocious or cruel." (Sec. 921. 141(5)(h)). A similar statutory provision was upheld on its face in Gregg v. Georgia, 428 U.S. 153 (1976), on the assumption that the state supreme court would not adopt "such an open ended construction" as to allow imposition of the death penalty "in any murder case" id. at 201 (opinion of Stewart, Powell, and Stevens, JJ.) In Proffit v. Florida, 428 U.S. 242, 255-6 (1976), an identical provision was upheld because it had been narrowed by the state court interpretation. In Godfrey v. Georgia, __U.S.__, 64 L.Ed.2d 398 (1980), this Court again reviewed the Georgia statutory provision and found that the law had not been permissably narrowed to "Distinguish [Godfrey's] case, in which the death penalty was imposed, from the many cases in which it was not," id. at 409.

In the present case, both the Trial Court and the Supreme Court of Florida failed to narrow Florida's construction of the death sentence " id. at 406.

It is clear from the record that the facts of this case do not approach the level of "especially henious, cruel or atrocious" behavior found in prior cases. See Proffitt vs. Florida, 428 U.S. 242, 255 n. 12. Petitioner's actions were in fact far less reprehensible than those of the defendant in Godfrey v. Georgia, in which this Court held the Georgia Supreme Court's

interpretation of a similar provision to be unconstitutionally overboard. */

The Defendant in Godfrey carried a shotgun to his wife's trailer, first shot his wife in the presence of his daughter and mother-in-law, then struck his daughter on the head with the barrel of the gun, reloaded the weapon, and entered the trailer to shoot his mother-in-law, "whose last moments as a sentinent being must have been as terrifying as the human mind can imagine," id. at 419 (Rehnquist, J., dissenting).

In the instant case, the victim's death was caused by stabbing and blows inflicted to his head. This does not meet the test as has been determined by current jurisprudence of "especially heinous, atrocious. and cruel." The entire scheme of the aggravating circumstances as set forth in the Florida Statute (Sec. 921, 141) is unconstitutionally overbroad and impermissably distorts the weighing process required to prevent arbitrary infliction of the death penalty. See Appendix "B," infra.

II.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER PETITIONER RECEIVED THE STANDARD OF FAIR TRIAL MANDATED BY THE UNITED STATES CONSTITUTION

POINT I

THE TRIAL COURT ERRED BY GIVING AN IMPROPER AND INSUFFICIENT INSTRUCTION TO THE JURY AS TO THE PROPER USE OF EVIDENCE OF PETIONER'S PRIOR CONVICTION(S) OF CRIME (OF APPELLANT).

In its closing argument to the jury, the prosecutor argued as follows:

*/ The Florida Court's failure to limit the statutory aggravating circumstance results apparently in part from its refusal to compare the death sentence in the present case with other death sentences imposed under the "especially henious, atrocious, or cruel" clause.

> "This Court will tell you that a witness's testimony can be completely destroyed by proof that he had been convicted of a crime. Well listen, six times, six times he had gotten out of Raiford, six times. Five times before the time that he was in Raiford that he told you that he had just gotten out of jail on. You consider that. You put that with his interest and reasonableness of his testimony and I submit to you, ladies and gentlemen, that the State has overwhelmingly proved the case of first degree murder of anything you want to go under, it's first degree murder." (T 938)

Evidence of a prior conviction of a criminal Defendant is sanctioned by Section 90.08, Florida Statutes, only if and when a Defendant takes the stand and it is to be strictly limited as provided herein. It is the position of the Petitioner that the instructions given on this particular point by the Court were not sufficient to appraise the jury of the use which they were permitted to make of the evidence of the Petitioner's convictions. In the case at bar, the jury was left free by the Court's instructions to make any use it saw fit of the evidence of the Petitioner's prior convictions, (Including a presumption of guilt as to the crime charged). The Petitioner on this point relies strongly on Noeling v. State, 40 So.2d 120 (Fla. 1949) and Gluck v. State, 62 So.2d 71 (Fla. 1952 wherein the Court held that a statement, by the prosecuting attorney in his final argument to the jury to the effect that a Defendant had possibly been tried on other criminal charges before was objectionable. In Noeling, the prosecutor in argument made the following statement:

> "And this is not possibly the first time he (the Defendant) has gone through this ordeal before." Noeling v. State, supra at 121.

In reversing, the court held:

> "The Court promptly instructed the jury to disregard the statement. It is questionable whether the Court's admonition cured the harm." Id. at 121

The Petitioner would re-cite Simmons v. State, 139 Fla. 645, 190 So 756 (Fla. 1939) and Fitzgerlad v. State, 227 So.2d 45 (3 DCA 1969) as authority for his contention that both the instruction and the argument of the prosecutor were improper and constituted reversible error.

POINT II

> THE TRIAL COURT ERRED IN ADMITTING, BY DEPOSITIONS OF ANAHEIM, CALIFORNIA POLICE OFFICERS GERALD STEC AND FRANK TRESENRIDER, EVIDENCE THAT THE PETITIONER HAD BEEN INVOLVED IN A GUN BATTLE WITH THE TWO OFFICERS AND OTHERS AT THE TIME OF HIS ARREST IN ANAHEIM, CALIFORNIA

The Petitioner did not object on this point to allowing the testimony of Officer Spec and Tresenrider to be read from depositions because he argued that such evidence was not necessary to the question of flight and was so highly prejudicial that it was reversible error to permit its entrance into the case. The question this point presents first enters the case when the prosecutor announced that he intended to introduce evidence of the Appellant's flight to California and subsequent shooting at the police officers who were attempting to arrest him. (T 27)

The use of the deposition in lieu of requiring the involved officers be brought to Florida to testify personally was considered in the following statement"

> "MR. FALLIN: Now as far as the form of testimony coming in through depositions, I have already agreed to that; we don't need the persons here to testify." (T 27)

Following arguments concerning the admissability of evidence of the flight in general, and the gun battle in Anaheim in particular, the Trial Court then ruled that evidence of the flight to California would be admitted as well as evidence of the gun battle there.

It is the position of the Petitioner that the way this matter was handled is a direct violation of the Williams[*/] Rule inasmuch as the gun battle in California became a feature, instead of an incident, of the whole trial. The description of the gun battle was irrelevant and unnecessary to any issue in the case. The effect could not have been other than highly prejudicial to the Petitioner inasmuch as he was, in effect, placed on trial, for a crime commited in another State for which he was not even charged.

It is the position of the Petitioner that the introduction of the gun fight with the officers in California was unnecessary to the question of flight and was so highly prejudicial that it was reversible error to permit its entrance into the case at all.

In Smith v. State, 344 So.2d 915, (1 DCA 1977), a second degree murder case from the Fourth Judicial Circuit (Duval County) the Court held:

> "We have held in other contexts that the trial Court must engage in a balancing process to determine whether the relevancy of certain evidence is outweighed by the potential prejudice to the defendant." Id. at 918.

The Smith Court then set forth the following guidelines, among others, that are to be taken into consideration in determining whether evidence of this type should or should not be included:

1. Relevancy - to what extent is the objectionable evidence relevant;

2. The necessity of the evidence - how important is the testimony to the State's case;

3. The quality of the testimony - is the testimony related to the material issue of the case or is it more inclined to demonstrate the bad character of the accused, thereby unduly prejudicing him. Id.

---

*/ Williams v. State, 110 So. 2d 654, 633 (Fla. 1959)

In applying these guidelines to the present case, it is clear that Points 2 and 3 are exceedingly questionable; there certainly was no necessity for the evidence nor was it important to the State's, case and the quality of the testimony was not related to the material issue or issues of the case but was more inclined to demonstrate the bad character of the accused, thereby unduly prejudicing him. As in Smith, supra, the inescapable conclusion which one arrives at from a study of the record in the case at bar is that the prosecution indulged in "over-kill", they used as evidence matters that had little, if any, probative value, which had no purpose except to picture the Defendant before the jury as a man with a thoroughly criminal character and propensity who was entirely capable of commiting the crime for which he was charged. In terms of relevancy, necessity and quality, the introduction into evidence of the gun battle did not go to the material issue of first degree murder involved in this case.

POINT III

IN LIGHT OF THE EXTENSIVE PUBLICITY COVERING THE CRIME FOR WHICH PETITIONER WAS ON TRIAL, THE TRIAL COURT'S DENIAL OF PETITIONER'S TIMELY MADE MOTION FOR A CHANGE OF VENUE WAS ERROR IN VIOLATION OF PETITIONER'S FUNDAMENTAL RIGHT TO TRIAL BY AN IMPARTIAL JURY

The State on this point relied on Singer v. State, 109 So. 2d 7 (Fla. 1959):

> "We take care to make clear however, that every trial court, in considering a motion for a change of venue must liberally resolve in favor of the defendant any doubt as to the ability of the State to furnish the defendant a trial by a fair and impartial jury. Every reasonable precaution should be taken to preserve to a defendant trial by such a jury and to this end if there is a reasonable basis shown for a change of venue a motion properly made should be granted." Id. at 14.

In Singer, the Court denied a motion for Change of Venue.

The Petitioner would like to point out that in the Singer case, the Trial Judge's denial of a Motion for Change of Venue was upheld. However, that denial was not authority for a denial in the case at bar inasmuch as the Singer case was reversed on other grounds.

The Petitioner would further point out that the case at bar had widespread notiriety before the case was ever brought to trial. In fact, the case was tried after the conviction of a co-defendant, Timothy Palmes, during which time, newspaper publicity had related that Palmes did not deny his commission of the crime and even went to the point of making what amounted to a public confession. It is the position of the Petitioner that this case comes within the prohibition laid down in Oliver v. State, 250 So.2d 888 (Fla. 1971) in which it was said:

> "We now resolve this conflict by announcing that as a general rule when a "confession" is featured in news media coverage or a prosecution, as here, a change of venue motion should be granted whenever requested; we also held that in the case sub judice the voir dire process cannot cure the effect of a "confession" which has been given news media coverage." Id. at 890.

It is the position of the Petitioner that the handling of this case by the Trial Court was within the prohibition set forth in Oliver v. State.

Each of the above Points I, II, and III deprived Petitioner of a fair trial before an impartial jury as mandated by the Constitution of the United States.

CONCLUSION

For the reasons set forth above, certiorari should be granted.

August 31, 1981

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APPENDIX "A"

Ronald J. STRAIGHT, Appellant,

v.

STATE of Florida, Appellee.

No. 52466.

Supreme Court of Florida.

March 19, 1981.

Rehearing Denied June 2, 1981.

Defendant was convicted in the Circuit Court, Duval County, Virginia Q. Beverly, J., of murder and sentenced to death, and he appealed. The Supreme Court held that: (1) trial court did not abuse its discretion in denying defendant's motion for change of venue; (2) trial court did not err in admitting photographs depicting victim's body which was recovered from river after 20 days, and which showed wounds inflicted on deceased and were quite gruesome because of decomposition; (3) evidence of defendant's flight from police and use of his gun was relevant to issue of his guilty knowledge and thereby to the issue of guilt; (4) assistant state attorney's question suggesting unrelated criminal activity, which was calculated to elicit irrelevant testimony and suggested to the jury existence of such prejudicial evidence was improper; however, improper comment by itself was insufficient to require that the court grant motion for mistrial; and (5) sentence of death imposed upon defendant was proper.

Affirmed.

Sundberg, C. J., concurred in result.

1. Criminal Law ⇐1038.1(5), 1038.3

Where defense attorney at trial did not object to instruction on credibility or ask for a different or additional one, issue whether judge had a duty to instruct the jury that evidence of prior convictions could only be used in evaluating the defendant's credibility and for no other purpose was waived on appeal.

2. Criminal Law ⇐121

Trial court did not abuse its discretion in denying defendant's motion for change of venue, which was filed due to widespread publicity of murder and news media coverage of his codefendant's confession, in that it was not clear that confession of codefendant implicated both himself and defendant, prospective jurors exhibiting even a hint of prejudice were excused, and court granted the defendant extra peremptory challenges, yet defense counsel did not use them all.

3. Criminal Law ⇐438(1)

Basic test of admissibility of photographs is not necessity, but relevance; photographs can be relevant to material issue either independently or by corroborating other evidence.

4. Criminal Law ⇐438(6)

Trial court in murder prosecution did not err in admitting into evidence photographs depicting victim's body which was recovered from river after 20 days, and which showed wounds inflicted on the deceased and were quite gruesome because of decomposition, in that photographs were few in number and included only a very few gruesome ones which were relevant to corroborate testimony as to how death was inflicted.

5. Criminal Law ⇐376

It is improper for a jury to base a verdict of guilt on the conclusion that because the defendant is of bad character or has a propensity to commit crime, he therefore probably committed the crime charged.

6. Criminal Law ⇐369.2, 1163(3)

Evidence of criminal activity not charged is inadmissible if its sole purpose is to show bad character or propensity to crime, but evidence of criminal activity not charged is admissible if relevant to an issue of material fact; if irrelevant, its admission is presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged.

7. Criminal Law ⇐351(3, 4, 5)

When a suspected person in any manner attempts to escape or evade a threatened prosecution by flight, concealment, resistance to lawful arrest, or other indications after the fact of a desire to evade prosecution, such fact is admissible, being relevant to the consciousness of guilty which may be inferred from such circumstance.

8. Criminal Law ⇐370

Testimony establishing that defendant, who was convicted of murder, fired his gun in direction of police officers in California prior to his arrest was proper, in that evidence of defendant's flight from police and use of his gun was relevant to issue of his guilty knowledge and thereby to the issue of guilt.

9. Criminal Law ⇐369.2(1)

Even when evidence of separate criminal activity has relevance, it is possible for such evidence, as it is presented, to have an improper prejudicial impact that outweighs its probative value.

10. Criminal Law ⇐706(4)

Assistant state attorney's question to defendant suggesting unrelated criminal activity, which was calculated to elicit irrelevant testimony and suggested to the jury the existence of such prejudicial evidence, was highly improper; however, improper comment by itself was insufficient to require the court to grant motion for mistrial, in that improper comment did not tend to discredit any particular feature of defendant's account of his activities during time crime was being committed or undermine any particular theory of the defense, and, in light of the overwhelming evidence against defendant, it was inconceivable that the prosecutor's improper question might have affected the verdict.

11. Homicide ⇐354

Sentence of death imposed upon defendant, who was convicted of murder, was proper, in that evidence that defendant was on parole from prison at time of offense supported finding of aggravating circumstance that crime was committed when defendant was under sentence of imprisonment, court properly found one statutory aggravating circumstance based on commission of murder in the course of the felony of robbery, and evidence supported factual findings that defendant directly participated in murder inflicted by multiple stab wounds and bludgeoning establishing statutory aggravating factor that felony was especially heinous, atrocious, and cruel. West's F.S.A. § 921.141(5)(a, d, f, h).

12. Criminal Law ⇐1208(1)

Where double recitation of aggravating circumstances in determining propriety of death sentence based on a single aspect of the crime indicates that inflated consideration was accorded to the factor, it is error; however, error of double recitation is harmless where it is clear that the sentencing judge merely recited both statutory factors without giving improper double consideration to the single aspect in question, or where the absence of mitigating circumstances makes clear that any added weight accorded the factor did not tip the balance in favor of a sentence of death rather than life.

H. Randolph Fallin, Jacksonville, for appellant.

Jim Smith, Atty. Gen., and Carolyn M. Snurkowski, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

This cause is before the Court on appeal from a judgment of the Circuit Court of the Fourth Judicial Circuit, in and for Duval County. Appellant Ronald J. Straight was convicted of murder in the first degree and sentenced to death. We have jurisdiction of his appeal. Art. V, § 3(b)(1), Fla.Const. We have given careful consideration to each of the appellant's stated grounds of appeal, as the discussion to follow will show. We have reviewed the entire record of the proceedings below in order to determine whether the jury's verdict of guilt was supported by competent, substantial evidence.

We have also reviewed the sentencing proceeding to determine whether the sentence of death is appropriate to this case under the law. § 921.141(4), Fla.Stat. (1975). We affirm the conviction and the sentence.

The evidence at trial showed that at the time of the crime the appellant and Timothy Charles Palmes were living in an apartment also occupied by Jane Albert and her seven-year-old daughter, Stephanie. Mrs. Albert was employed by James Stone at his furniture store. On the day of the crime, in accordance with a plan conceived by Jane Albert, Palmes, and the appellant, James Stone was lured to the apartment. When Stone left the store to go to the apartment, Albert telephoned Palmes and Straight to tell them that Stone was on his way.

When Stone arrived at the apartment, the seven-year-old Stephanie, on instructions from Palmes and Straight, admitted him and directed him to one of the bedrooms. There Palmes and Straight bound him with wire and placed him in a large box they had constructed in the apartment. They tormented him with hammer blows and stabbings for approximately half an hour before he died from the knife wounds. Then they sealed the box, removed it to a truck, and dumped it in the St. Johns River.

The next day appellant, Palmes, Albert, and Stephanie left Florida taking Stone's car, his credit cards, money from his wallet, and several days' cash receipts from the furniture store. They were arrested in California. Straight fled as police officers approached him and attempted to avoid arrest by firing at the officers.

Mrs. Albert was given immunity and testified at trial as a witness for the state.

Palmes and Straight were jointly indicted for murder in the first degree. Their trials were severed; Palmes was tried first and convicted. Among the items of evidence introduced against him was his confession. There was news media coverage of the fact that he made a confession and also of his later retraction and his repudiation of the confession at trial.

[1] Appellant presents five points on appeal of his conviction. Among them is the argument that the court failed to adequately instruct the jury on the limited use they could make of appellant's prior convictions, which were brought out on his cross-examination, and that this failure was reversible error. He argues that after eliciting the fact of the six convictions on cross-examination of appellant, the prosecutor subsequently commented on them. Thus, he argues, the judge had a duty to instruct the jury that the evidence of prior convictions could only be used in evaluating the defendant's credibility and for no other purpose. We decline to discuss the merits of this argument because the defense attorney at trial did not object to the instruction on credibility or ask for a different or additional one. "An appellate court must confine itself to a review of only those questions which were before the trial court and upon which a ruling adverse to the appealing party was made." *State v. Barber*, 301 So.2d 7, 9 (Fla.1974). In order to secure appellate review of jury instructions, the defendant must make known to the court what charges he wants the court to give or not give and his grounds therefor. *See Williams v. State*, 285 So.2d 13 (Fla.1973); Fla.R.Crim.P. 3.390(d).

Appellant's remaining arguments are: (1) that the court should have granted a change of venue; (2) that the court should have excluded from the evidence certain photographs said to be gruesome and inflammatory; (3) that the court erred in admitting into evidence the depositions of two California police officers which established that appellant resisted arrest there with deadly force; and (4) that the court should have granted a mistrial when on cross-examination of the appellant the state's counsel asked a question, other than permitted impeachment, about unrelated criminal activity.

Appellant contends that the denial of his motion for change of venue deprived him of a fair trial because of widespread publicity. The record shows that the case received considerable media attention and that knowledge of the murder was widespread.

Four-fifths of the prospective jurors, and eight of the twelve jurors who served on the jury, had some prior knowledge of the case. The crucial consideration, however, is not knowledge, but whether such knowledge rendered the jurors prejudiced.

A motion for change of venue is a matter addressed to the sound discretion of the trial court, and the trial court's decision will generally be upheld if there is no showing of a palpable abuse of discretion. *Johnson v. State*, 351 So.2d 10 (Fla.1977); *McNealy v. State*, 17 Fla. 198 (1879).

The motion for a change of venue based on widespread prejudicial publicity called for a determination by the trial court of

> whether the general state of mind of the inhabitants of the community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom.

Manning v. State, 378 So.2d 274, 276 (Fla. 1979); *Jackson v. State*, 359 So.2d 1190 (Fla.1978), *cert. denied*, 439 U.S. 1102, 99 S.Ct. 881, 59 L.Ed.2d 63 (1979); *Kelley v. State*, 212 So.2d 27 (Fla. 2d DCA 1968).

[2] Appellant argues that the news media coverage of his codefendant's confession brings this case within the rule of *Oliver v. State*, 250 So.2d 888, 890 (Fla.1971), in which this Court said that in general, "when a 'confession' is featured in news media coverage of a prosecution, ... a change of venue motion should be granted whenever requested...." It is not clear in the instant case, however, that the confession of Palmes implicated both himself and his co-defendant, as was the case in *Oliver*. *Oliver* dealt with a crime committed during a period of racial unrest. The victim was white and the defendants were black. The community in question was a relatively small one. *Compare Dobbert v. State*, 328 So.2d 433 (Fla.1976) *aff'd*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977) *with Manning v. State*, 378 So.2d 274 (Fla.1979). The circumstances here are different.

Furthermore, the general rule stated in *Oliver* has been restricted and refined. In *Hoy v. State*, 353 So.2d 826 (Fla.1977), *cert. denied*, 439 U.S. 920, 99 S.Ct. 293, 58 L.Ed.2d 265 (1978), the appellant argued that the rule of *Oliver* required a change of venue because of publicity surrounding his confession. The Court distinguished *Oliver*, and pointed out that Hoy's retraction of his confession was covered with equal prominence in the newspaper and that none of the jurors had actually read the articles in question. We hold that *Oliver* does not require reversal in the present case.

The trial judge here presided over a long and painstaking voir dire procedure. The record shows that prospective jurors exhibiting even a hint of prejudice were excused. The court granted the appellant extra peremptory challenges and defense counsel did not use them all. The court did not abuse its discretion in denying the motion for change of venue.

[3] Appellant next argues that the court erred in admitting a number of photographs over the objection that they were not relevant to any material issues in the case. In support of this contention at trial, the appellant stated his willingness to stipulate to several factual matters which he argued were the only facts the photographs were relevant to prove. Among the photographs objected to were several depicting the victim's body which was recovered from the river after twenty days. The pictures showed the wounds inflicted on the deceased and were quite gruesome because of decomposition. The basic test of admissibility of photographs, however, is not necessity, but relevance. *Bauldree v. State*, 284 So.2d 196 (Fla.1973). Photographs can be relevant to a material issue either independently or by corroborating other evidence. *State v. Wright*, 265 So.2d 361 (Fla.1972).

> Relevancy is to be determined in the normal manner, that is, without regard to any special characterization of the proffered evidence. Under this conception, the issues of "whether cumulative," or "whether photographed away from the scene," are routine issues basic to a deter-

mination of relevancy, and not issues arising from any "exceptional nature" of the proffered evidence.

Id. at 362.

[4] In *Young v. State*, 234 So.2d 341 (Fla.1970), the Court had for consideration the contention that gruesome photographs denied the appellant a fair trial. Forty-five photographs in all were admitted, including twenty-five showing the partially decomposed body of the victim. The victim had drowned. The Court said:

> The fact that the photographs are offensive to our senses and might tend to inflame the jury is insufficient by itself to constitute reversible error, but the admission of such photographs, particularly in large numbers must have some relevancy, either independently or as corroborative of other evidence.
>
> Several of the photographs were unquestionably relevant to the issues before the jury, as one color photograph depicting a tatoo on the victim's arm for purposes of establishing his identification. One issue before the jury was whether the deceased had committed suicide or whether he was murdered, the specific question being whether the victim could possibly have arranged strands of wire around himself in the manner in which it was found upon his recovery from the lake. Several of the photographs taken in the office of the County Medical Examiner at the time of the autopsy were relevant to this issue, as they revealed the manner in which several strands of wire had been wrapped around the victim's neck and body.
>
> We do not intend to invade the discretion of the state in the selection of evidence which it chose to present to the jury, or the discretion exercised by the trial court in admitting such evidence, but we must insure that both state and trial court act within reasonable limits. The very number of photographs of the victim in evidence here, especially those taken away from the scene of the crime, cannot but have had an inflammatory influence on the normal fact-finding process of the jury. The number of inflammatory photographs and resulting effect thereof was totally unnecessary to a full and complete presentation of the state's case. The same information could have been presented to the jury by use of the less offensive photographs whenever possible, and by careful selection and use of a limited number of the more gruesome ones relevant to the issues before the jury. In concluding that reversible error was committed by introduction of an unnecessarily large number of inflammatory photographs, we are merely applying to the facts of this case a principle reiterated in *Leach v. State* [132 So.2d 329, 331–32 (Fla.1961), *cert. denied*, 368 U.S. 1005, 82 S.Ct. 636, 7 L.Ed.2d 543 (1962)].
>
> "[W]here there is an element of relevancy to support admissibility then the trial judge in the first instant and this Court on appeal must determine whether the gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jury and detract them from a fair and unimpassioned consideration of the evidence."

Young v. State, 234 So.2d at 347–48 (footnotes omitted). Thus *Young v. State* and the cited case of *Leach v. State* recognize that even relevant photographs sometimes must be excluded if they are unduly prejudicial, but the pictures in the present case were not repetitive as in *Young* and were of greater relevance. We hold that all the photographs admitted were relevant either independently or as corroborative of other evidence, specifically, the testimony of witnesses. They were few in number and included only a very few gruesome ones which were relevant to corroborate testimony as to how death was inflicted. The photographs were properly admitted.

Appellant's third contention is that it was error to admit the testimony establishing that appellant fired his gun in the direction of police officers in California. He argues that evidence of collateral criminal activity is inadmissible because of its potential prejudicial impact.

[5, 6] It is improper for a jury to base a verdict of guilt on the conclusion that because the defendant is of bad character or has a propensity to commit crime, he therefore probably committed the crime charged. *See, e. g., Winstead v. State*, 91 So.2d 809 (Fla.1956); *Nickels v. State*, 90 Fla. 659, 106 So. 479 (1925). Therefore, evidence of criminal activity not charged is inadmissible if its sole purpose is to show bad character or propensity to crime. But evidence of criminal activity not charged is admissible if relevant to an issue of material fact. *Williams v. State*, 110 So.2d 654 (Fla.), *cert. denied*, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959). If irrelevant, its admission is presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged.

[7] When a suspected person in any manner attempts to escape or evade a threatened prosecution by flight, concealment, resistance to lawful arrest, or other indications after the fact of a desire to evade prosecution, such fact is admissible, being relevant to the consciousness of guilt which may be inferred from such circumstance. *State v. Young*, 217 So.2d 567 (Fla. 1968), *cert. denied*, 396 U.S. 853, 90 S.Ct. 112, 24 L.Ed.2d 101 (1969); *Daniels v. State*, 108 So.2d 755 (Fla.1959); *Blackwell v. State*, 79 Fla. 709, 86 So. 224 (1920).

[8] We hold that the evidence of appellant's flight from police and use of his gun was relevant to the issue of his guilty knowledge and thereby to the issue of guilt. Appellant was willing to use at least the threat of deadly force to try to avoid arrest. This is probative of his mental state at the time. The depositions were properly admitted.

Appellant's final contention concerns a question asked him by the state's counsel on cross-examination. Appellant's motion for mistrial made when the question was asked was denied. His objection to the question was sustained and his request that the jury be instructed to disregard the question was granted. So, the question was never answered. The challenge now is not to the admission of any evidence but to the very impropriety of the question. Appellant contends that that impropriety required the declaration of a mistrial.

During the direct examination of Jane Albert, she told of how she had purchased a gun for appellant in accordance with a request from him. On cross-examination, defense counsel asked Albert if there had been talk of appellant doing a drug deal in Texas. She replied that she knew nothing of a Texas deal but had heard of a plan to procure some drugs from a Dr. Day. Neither the state nor the defense questioned her further regarding Dr. Day or the nature of the transaction that was talked about.

Appellant took the witness stand in his own defense. On cross-examination the state's counsel asked him about his activities on the day of the murder. He testified that during the afternoon or evening of that day he went to visit a woman in order to obtain some drugs. The prosecutor asked whether he knew the source of the drugs.

Q. What doctor did she go to to get her prescriptions?

A. I have no idea.

Q. Would it have been Dr. Day?

A. I don't have no idea.

Q. You never heard that name mentioned?

A. No, sir.

Q. Isn't it true that it was Dr. Day that you were going to use the pistol on that Jane bought you?

Transcript of testimony at 832–33. Defense counsel immediately asked to approach the bench and moved for a mistrial on the ground that the prosecutor's question constituted a suggestion of unrelated criminal activity prejudicing the jury against the defendant. The court denied the motion for mistrial but sustained the objection. The question was not answered and the jury was instructed to disregard the question.

Appellant argues that the denial of his motion for a mistrial was reversible error. He grounds this argument on the rule that

evidence of unrelated criminal activity of an accused is inadmissible. Evidence of separate crime, however, is generally admissible if somehow relevant to an issue of material fact. There are a number of recognized ways that separate criminal activity can be relevant. *Williams v. State*, 117 So.2d 473 (Fla.1960).

On the other hand, it is generally harmful error "to admit evidence of other or collateral crimes independent of and unconnected with the crime for which the defendant is on trial." *Nickels v. State*, 90 Fla. 659, 685, 106 So. 479, 488 (1925). As stated above, the reason for this rule, establishing the harmfulness of the error in admitting a certain class of irrelevant evidence, is:

> Evidence that the defendant has committed a similar crime, or one equally heinous, will frequently prompt a more ready belief by the jury that he might have committed the one with which he is charged, thereby predisposing the mind of the juror to believe the prisoner guilty.

Id. at 685, 106 So. at 488. The opinion in *Williams v. State*, 110 So.2d 654 (Fla.), *cert. denied*, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959), told of how this recognition of the possible prejudicial impact led to the rule being stated as a rule of exclusion with certain exceptions rather than as a rule of admissibility. *See, e. g., Winstead v. State*, 91 So.2d 809 (Fla.1956); *Talley v. State*, 160 Fla. 593, 36 So.2d 201 (1948); *Whitehead v. State*, 279 So.2d 99 (Fla. 2d DCA 1972).

[9] Even when the evidence of separate criminal activity has relevance, it is possible for such evidence, as it is presented, to have an improper prejudicial impact that outweighs its probative value. *See, e. g., Williams v. State*, 117 So.2d 473 (Fla.1960); *Denson v. State*, 264 So.2d 442 (Fla. 1st DCA 1972).

Appellant cites several cases where convictions were reversed because of the admission of evidence of unrelated crime, *Raguss v. State*, 338 So.2d 1103 (Fla. 4th DCA 1976); *Colbert v. State*, 320 So.2d 853 (Fla. 1st DCA 1975), *cert. denied*, 330 So.2d 726 (Fla.1976); *Whitehead v. State*, 279 So.2d 99 (Fla. 2d DCA 1973). In each of these cases, the defendant's objection was overruled and the state was permitted to confront the defendant with or admit evidence of accusations or arrests. Thus they do not resolve the issue in the present case which is whether the mere propounding of a question by the prosecutor, seeking to elicit testimony that would be irrelevant but which suggests the existence of unrelated criminal activity, is reversible error when the objection to the question is sustained, the witness does not answer, and the jury is instructed to disregard the question.

[10] That the assistant state attorney's question, calculated to elicit irrelevant testimony and suggesting to the jury the existence of such prejudicial evidence, was highly improper, is without question. We do not believe, however, that the improper comment, by itself, was sufficient to require that the court grant the motion for a mistrial. *Feldman v. State*, 194 So.2d 48 (Fla. 4th DCA 1967). The appellant denied any involvement or knowledge of the crime charged. The improper comment did not tend to discredit any particular feature of appellant's account of his activities during the time the crime was being committed or undermine any particular theory of the defense. Its impropriety lay in its general attack on the defendant's character. In light of the overwhelming evidence against appellant, we find it inconceivable that the prosecutor's improper question might have affected the verdict. The motion for mistrial was properly denied.

After the separate proceeding on sentence was held, the jury returned a recommended sentence of death. The court deferred sentencing until after the receipt of a presentence investigation. A copy of the presentence investigation report was furnished to appellant prior to sentencing.

As aggravating circumstances, the court found that appellant committed the murder while under a sentence of imprisonment, § 921.141(5)(a), Fla.Stat. (1975), that the murder was committed in the course of a robbery, *id.* § 921.141(5)(d), that the murder was committed for pecuniary gain, *id.* § 921.141(5)(f), and that the murder was

especially heinous, atrocious, and cruel. *Id.* § 921.141(5)(h). The court found that there were no mitigating circumstances.

[11] The trial judge's finding that appellant was under sentence of imprisonment was based on the fact that he was on parole from prison. We hold that this fact, established by evidence, supports the finding of this aggravating circumstance.

[12] The trial judge's findings that the murder was committed in the course of a robbery and that it was committed for pecuniary gain are both based on the same aspect of the crime. Where such double recitation of aggravating circumstances based on a single aspect of the crime indicates that inflated consideration was accorded to the factor, it is error. *Provence v. State*, 337 So.2d 783 (Fla.1976), *cert. denied*, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). Where it is clear that the sentencing judge merely recited both statutory factors without giving improper double consideration to the single aspect in question, or where the absence of mitigating circumstances makes clear that any added weight accorded the factor did not tip the balance in favor of a sentence of death rather than life, the error of double recitation is harmless. *See Hargrave v. State*, 366 So.2d 1 (Fla.1978), *cert. denied*, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979); *Elledge v. State*, 346 So.2d 998 (Fla.1977). We approve the finding of one statutory aggravating circumstance based on the commission of murder in the course of the felony of robbery.

The trial judge's finding that the capital felony was especially heinous, atrocious, and cruel was based on evidence that appellant directly participated in the murder inflicted by multiple stab wounds and bludgeoning. The evidence supports the factual findings and the facts establish this statutory factor. *See, e. g., Washington v. State*, 362 So.2d 658 (Fla.1978), *cert. denied*, 441 U.S. 937, 99 S.Ct. 2063, 60 L.Ed.2d 666 (1979); *Funchess v. State*, 341 So.2d 762 (Fla.1975), *cert. denied*, 434 U.S. 878, 98 S.Ct. 231, 54 L.Ed.2d 158 (1977).

Upon our review of the sentencing proceedings and the court's findings based on the whole record, we conclude that there was no prejudicial error in the sentencing phase and that the court properly found several aggravating circumstances and no mitigating circumstances. The sentence of death is proper.

The judgment of conviction of murder in the first degree is affirmed. The sentence of death, having been found to be appropriate to this case, is approved.

It is so ordered.

ADKINS, BOYD, OVERTON, ENGLAND and ALDERMAN, JJ., concur.

SUNDBERG, C. J., concurs in result only.

Stephen Todd BOOKER, Appellant,

v.

STATE of Florida, Appellee.

No. 55568.

Supreme Court of Florida.

March 19, 1981.

Rehearing Denied June 2, 1981.

Defendant was convicted in the Circuit Court, Alachua County, John J. Crews, J., of murder in the first degree, sexual battery and burglary, and sentenced to death, and he appealed. The Supreme Court, Adkins, J., held that: (1) in sentencing procedure, trial court was correct in ruling that state attorney had right to inquire as to what defendant remembered; (2) photograph revealing knife protruding from victim's throat was admissible; (3) trial judge did not abuse his discretion in admitting card containing set of latent fingerprints lifted from closet door located inside bedroom of victim's apartment; (4) overwhelm-

APPENDIX "B"

827.03 or child abuse under s. 827.04. The court may grant an order to videotape testimony as provided herein only if it finds that:

(a) The victim of the offense is a child 11 years of age or younger; and

(b) There is a substantial likelihood that such child will suffer severe emotional or mental strain if required to testify in open court.

(2) The trial judge shall preside at such proceeding and shall rule on all questions as if at trial.

(3) The application referred to in subsection (1) shall be made prior to trial, and the videotaping of the testimony shall be made only after the trial has commenced. The videotaped testimony shall be admissible as evidence in the trial of the cause.

Laws 1979, c. 79-69, §§ 1 to 3, eff. May 22, 1979.

Laws 1979, c. 79-69, § 3, provides:
"Rule 3.190(j), Florida Rules of Criminal Procedure, is hereby repealed insofar as it is inconsistent with the provisions of this act."

Cross References
Motion to take deposition to perpetuate testimony, see Criminal Procedure Rule 3.190(j).

CHAPTER 919. CONDUCT OF JURY

919.01 to 919.22 Repealed by Laws 1970, c. 70-339, § 180

For superseding provisions contained in 1972 Florida Rules of Criminal Procedure, see, now, Rules 3.370, 3.391 et seq.

CHAPTER 921. SENTENCE

Sec.
921.143 Appearance of victim to make statement at sentencing hearing; submission of written statement [New].

Sec.
921.241 Felony judgments; fingerprints required in record [New].

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

(1) Separate proceedings on issue of penalty.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) **Findings in support of sentence of death.**—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) **Review of judgment and sentence.**—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) **Aggravating circumstances.**—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) **Mitigating circumstances.**—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.